80-2026

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MAR 29 1981
ALEXANDER L. STEVAS
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1980

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HOWARD BROWN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

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## QUESTIONS PRESENTED

I

Whether due process is violated when the State is allowed to bolster their case by testimony, rendered by various detectives, that a non-testifying informant who was credited with making numerous narcotics buys for the police was totally reliable where the defense is denied the right to show, by cross examination or otherwise, the extensive criminal record of the alleged informant and other relevant facts?

II

Whether due process and the integrity of a criminal trial are offended when a trial court summarily excludes a third-party confession by an unavailable declarant, where there is sufficient indicia of the confession's trustworthiness, which confession totally exonerates the defendant?

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---

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Howard Brown, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on the 31st day of March, 1981, when the Supreme Court of Ohio denied further appellate review.

## OPINIONS OF THE COURT BELOW

The judgment entries by the Supreme Court of Ohio denying further appellate review are set forth at Appendices "A" and "B", infra, pp. A1 and A2 in the Appendix to this Petition.

The journal entry and opinion of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "C", p. A3, et. seq.

## STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on February 20, 1981. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved herein are set forth as Appendix "D", p. A15.

## STATEMENT OF THE CASE

The underlying factual situation in this appeal is set forth in considerable detail in the Opinion rendered by the Court of Appeals (see Appendix "C", pp. A3 to A13).

While there are serious flaws in some of the assertions which the court treats as "facts" in drawing certain conclusions as to the occurrence of

various events, there appears to be no real need, beyond the insertion of a few rudimentary "facts", to correctly structure for this Court the issues in this cause. So postured, the facts and circumstances critical to this cause show that:

> "On July 31, 1978, John Wesley Martin, an informant often used by the East Cleveland and Cleveland police departments, offered to set up a 'controlled' drug buy from appellant. East Cleveland detectives Copeland and D'Agostino agreed to supply Martin with $140.00 to purchase heroin from appellant. Thus, on that date, Martin telephoned the 'Heatwave' bar, of which appellant was an owner, from a telephone in the East Cleveland police station. While both detectives listened, and the call was tape-recorded, Martin spoke with a man, identified to be appellant by means of voice identification by Detective Copeland, who agreed to have two men driving a green Volkswagen meet Martin at a certain spot to consummate the sale of heroin. Subsequently, Martin met two men in a green Volkswagen at the specific location, entered the car and drove around with the men for a few minutes, and when let out of the car returned to the detectives with a quantity of brown powder identified as heroin by an Ohio Bureau of Criminal Identification and

> Investigation chemist. During this entire drive, the green Volkswagen and its occupants were kept under continual surveillance by Detectives Copeland and D'Agostino, as was Martin while he was picked up and dropped off by the car's occupants.
>
> The only evidence at trial connecting appellant to the crime was a tape recording and testimony of Detectives Copeland and D'Agostino relative to the telephone conversation had by Martin, plus a transcript of that conversation." (Appendix "C", pp. A4 to A6.)

Indeed it was petitioner's contention that, in addition to not being one of the conversants, he was willfully framed. To support this thesis, he called as witnesses Thomas Bradford and Charles King who were indicted with him to testify. Both of these witnesses took the Fifth Amendment for reasons which cannot be validated but which were nonetheless credited by the trial judge (R 262-270; 271-277).[1]

Also called was attorney Raymond J. Grabow who recalled a meeting he had with Bradford in his office (R 241). Bradford then signed an affidavit which affirmed that he, Bradford, did not

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1/ References to the transcript of the proceedings in this cause will be designated herein by the prefix "R".

know Howard Brown when he committed the offense attributed to him. As put by Bradford in his affidavit, Martin had approached he and King with a scheme which entailed Bradford answering the pay phone in the Heatwave Bar and pretending he was Howard Brown. The stated purpose of this scam was to con the police (R 247). The trial judge refused to allow Grabow to testify as to the contents of the affidavit. In addition, the statement in the Opinion below to the contrary notwithstanding (Appendix "C", p. A12), the following segment of the Record can only be read as a specific rejection by the court to allow the affidavit into evidence:

> THE COURT: On what theory do you claim that it is proper to receive an affidavit in this matter from a potential witness instead of having the witness on the stand?
>
> MR. JACOBS: May it please the Court, the Affidavit was prepared by Mr. Grabow. Mr. Grabow was not the attorney for Mr. Bradford. The Affidavit is an admission against interest by Mr. Bradford and an admission against interest is permitted under all rules of evidence. If necessary we can get -- I think the Supreme Court of the United States has even ruled on that issue. This man while under indictment for this crime gave a statement admitting that he was the recipient of a telephone call at the Heatwave Lounge and that he in conjunction with John Martin were attempting to participate in a

con to secure $140. I submit that that admission of interest is a valid document that can be introduced into evidence whether or not the witness himself does or does not testify.

There is no necessity to taking his deposition.

THE COURT: I don't know of any provisions for the receipt of such an Affidavit.

MR. NOLAN: I don't either.

THE COURT: I'll sustain the objection.

(R 247-248)

In addition, the Record also shows, despite the categorical statement in the Opinion (at p.A11) that "the Record reveals no attempt to introduce the affidavit itself into the evidence," the following critical colloquy developed:

MR. JACOBS: And A I would offer to introduce into evidence, the Affidavit of --

THE COURT: Bradford?

MR. JACOBS: -- Bradford, your Honor.

THE COURT: Objection sustained.

(R 290-291)

## ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Perhaps starting with Justice Holmes' dissent in Donnelly v. United States, 228 U.S. 243, 278 (1913), the trend has been toward admitting statements made against a declarant's penal interest. This trend can be said to have fully matured in Chambers v. Mississippi, 410 U.S. 284 (1973) and Rule 804(b)(3), Federal Rules of Evidence. (Ohio's Rule 804(B)(3) is identical.)

The impact of Chambers, which declared a third party's confession was admissible on due process grounds (despite the fact Mississippi did not have a penal interest exception to its hearsay rule), augmented by the absolute right of an accused to introduce evidence free of "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of prior categories that presume them unworthy of belief" (Washington v. Texas, 388 U.S. 14, 22 [1967]), makes the position taken here by the State court totally indefensible.

This reasoning seems to be especially compelling when Ohio v. Roberts, 448 U.S. 56 (1980), is also considered. For this Court could not possibly have meant to say in Roberts that for the prosecution to admit against an accused's third party declarations, it need only satisfy some "firmly rooted" hearsay rule exception but where, as here, the evidence is offered by the defense on the basis of the penal interest exception, or under

Chambers, more is required than a sufficient "indicia of reliability," Dutton v. Evans, 400 U.S. 74 (1970). Surely then, any requirement that an accused must meet a higher burden than Roberts imposes on the prosecution obviously offends due process. Thus, this case furnishes the Court with a situation where a third-party confession, totally exonerating this petitioner, was arbitrarily excluded for reasons that cannot be defended.

## ARGUMENT I

**DUE PROCESS IS VIOLATED WHEN THE STATE IS ALLOWED TO BOLSTER THEIR CASE BY TESTIMONY, RENDERED BY VARIOUS DETECTIVES, THAT A NON-TESTIFYING INFORMANT WHO WAS CREDITED WITH MAKING NUMEROUS NARCOTICS BUYS FOR THE POLICE, WAS TOTALLY RELIABLE AND THEN DENYING THE DEFENSE THE RIGHT TO SHOW, BY CROSS-EXAMINATION OR OTHERWISE, THE EXTENSIVE CRIMINAL RECORD OF THE ALLEGED INFORMANT AND OTHER RELEVANT FACTS.**

The appellate court, rather arbitrarily in our judgment, concluded that the jury's consideration of substantial testimony by various detectives describing their past dealings with the non-testifying informant (even though all cross-examination relevant to such testimony was barred on the basis of State's objections) was "if error... harmless." And, that in any event, since "Martin's past criminal activities were irrelevant to proof of the prosecutions' case" (Appendix "C", p.A11), it was not error to refuse cross-examination in this area.

For those of us who have been repeatedly victimized by the penchant of this particular Court of Appeals for divining reasons after the fact upon

which to excuse the State for having prejudiced a defendant, even by patently irrelevant evidence, the decision made here by them was no real surprise. Yet, it does seem strange that our Court of Appeals, which so readily concludes when the situation is reversed that such things as "the defense opened the door", or that the prejudicial "evidence was admissible" for some sophisticated purpose that had not even occurred to the proponent or the court (and surely had not been offered for such purpose) could not bring itself to conclude this petitioner was victimized.

For our part, it was simply unfair and a definite due process violation, for the trial court to have allowed the State to prove to the jury a particular scoundrel (who was not available to testify), was a good and reliable person who regularly operated as an informant for the testifying officers. And, then deny the defense the right to a searching cross-examination to show the jury just who that informant really was. Had this type of cross-examination of the detectives, who stated the informant was reliable (R 173), been allowed; the jury would have been able to make a meaningful assessment of the role attibuted by the prosecutor to this missing witness.

Viewed in this context, the examination sought to be made related to matters that were relevant both to the credibility of the detectives and to accuracy of their opinions conveyed to the jury that the informant was a very good citizen.

## ARGUMENT II

**DUE PROCESS AND THE INTEGRITY OF A CRIMINAL TRIAL ARE OFFENDED WHEN A TRIAL COURT SUMMARILY, AND ARBITRARILY, EXCLUDES A THIRD-PARTY CONFESSION BY AN UNAVAILABLE DECLARANT, WHERE THERE IS SUFFICIENT INDICIA OF THE CONFESSION'S TRUSTWORTHINESS, WHICH CONFESSION TOTALLY EXONERATES THE DEFENDANT.**

In dealing with the various issues implicated under this Argument, the appeals court first erroneously concluded no effort to introduce the Bradford affidavit was made and that Grabow's testimony as to its contents was clearly hearsay. (Cf., Appendix "C", p.A12, with R 290-291.)[2] As to the further conclusion that such testimony was hearsay because it was an attempt "to have Grabow testify to the contents of a statement made by Bradford" and the ruling that since the Record did not show any exception to the Hearsay Rule was applicable "the relevant assignment was without merit" (Appendix "C", pp.A11 and A12 ), the following analysis is a complete response.

Here we start with an idea that seems especially clear. The invocation

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2/ This segment of the Record is quoted above at pp. 5-7 of this Petition for Writ of Certiorari.

of the Fifth Amendment by Bradford made him unavailable as a witness for the defense. See State v. Williams, 43 Ohio St.2d 88 (1975). Also see Rule 804(A)(1), Ohio Rules of Evidence, which encompasses situations where the declarant is exempted from testifying by a ruling of the court sustaining the assertion of the Fifth Amendment.

Dealing first with the court's view that no exception to the hearsay rule fits this situation, it seems obvious the court either ignored, or was simply oblivious to, the statement or admission against interest concept. See, e.g., United States v. White, 553 F.2d 310 (2d Cir. 1977), and United States v. Bagley, 537 F.2d 162 (5th Cir. 1974). Also see Rule 804(b)(3), Ohio Rules of Evidence. Here, it is provided:

> "The following (is) not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

Of course, whether a particular statement is against the declarant's penal interest presents is a question of law. Granted, any determination of the statement's trustworthiness necessarily requires a review of the facts. On appeal, this also entailed a review of the trial court's application of the appropriate legal standard to those facts.

To be admissible under 804(b)(3), and the response of in Federal courts in comparable situations is persuasive, a statement must meet three tests: (1) the declarant's testimony must be unavailable, (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable man in his position would not have made the statement unless he believed it to be true, and (3) the statement, if offered to exculpate the accused, must be corroborated by circumstances clearly indicating its trustworthiness. United States v. Thomas 571 F2d 285 (5th Cir. 1978).

so construed, Rule 804(b)(3) would surely accommodate both direct and indirect confessions of criminal responsibility. In either case, the declarant's statement must, in a real and tangible way, subject him to criminal liability. Obviously, statements consisting principally of material exculpating a co-defendant are suspect in the absence of concurrent presence of solidly inculpatory statements against the penal interest of the declarant. Thus, courts consider the following factors relevant to trustworthiness: 1) the time of the declaration, 2) the party to whom it is

made, 3) the existence of corroborating evidence, 4) the extent to which the declaration is actually against the declarant's penal interest and 5) the availability of the declarant as a witness. See United States v. Hoyos, 573 F.2d 1111 (9th Cir. 1978), and United States v. Lang, 589 F.2d 92 (2d Cir. 1978).

For our part, the fact that attorney Grabow's evidence qualified as an exception to the Hearsay Rule under our Rules of Evidence makes it most clear Howard Brown was denied relevant evidence by a flagrantly erroneous ruling. This is so despite the rather clear that our rules were only adopted after this case was tried.

In any event, Rule 804, in the context here being urged, is a mere formalization of the law as it existed before the Rules. See State v. Williams, 43 Ohio St.2d 88 (1975). And, the case of Chambers v. Mississippi, 410 U.S. 284 (1973), makes it rather clear that an accused's right to due process is violated when the trial court excludes a confession of another exculpating the defendant. See, Comments, Constitutional Restraints on Exclusion of Evidence in Defendant's Favor, 73 Mich. L. Rev. 1465 (1975).

Still another case is United States v. Atkins, 558 F.2d 133 (3d Cir. 1977). There it was held to be reversible error to exclude a hearsay third party confession where there was sufficient corroborating circumstances indicating trustworthiness of the statement. As put by

the court, the "exclusion of the third party confession undermined the integrity of the trial" (558 F.2d, at 136). In United States v. Bagley, cited above, the deliverer of heroin to the declarant, who by trial time had died (hence was unavailable), said deceased told defendant the item was innocent valium and also that he had given it to him by mistake. There the court reasoned that "whether the statement was against the declarant's personal interest presented a question of law." Further, that any review of the finding of fact by the trial court on this point "will also require review of the trial court's application of a legal standard to these facts" (537 F.2d, at 165-166).

These latter cases show beyond per adventure the logic in our position that the Rule only states the law as it existed before and that is what is really involed in a due process consideration going to the integrity of the trial.

On the other hand, it could not be clearer that the trial court, doubtless because he was convinced the trial prosecutor really knew what he was talking about in voicing his objection, failed to even consider the facts here bearing on corroboration -- the most significant being the fact that it was made under penalty of perjury.

Specifically, and this tenet is controlling here, this Court in Chambers, supra, noted that "few rights are more fundamental than that of an accused to

present witnesses in his own defense." Id., at 302. What, of course, is being contended here is that because this persuasive evidence was excluded, petitioner was deprived of needed substantiation for his defense. Thus, this further deprived this petitioner of a fair opportunity to defendant against the indictment.

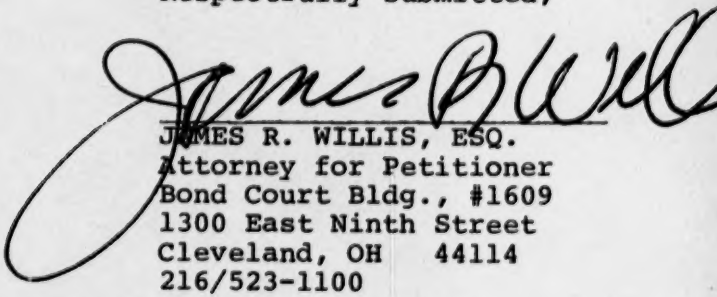
What makes Chambers all the more significant here are the closely analogous circumstances in the two cases. In Chambers, the State's Hearsay Rule prevented the defense from introducing evidence through independent witnesses that another person had actually confessed and, by so doing, exonerated the defendant. In reversing the conviction and ordering a new trial, this Honorable Court concluded Chambers' defense was "far less persuasive than it might have been" had the other confession been admitted." Id., at 294.

In our case, Howard Brown sought to introduce, through an independent wtness, testimony showing Bradford had confessed to being the person in whose place Howard Brown was being tried. This evidence, pure and simple, which thoroughly incriminated himself, would have exonerated Howard Brown. Since the court excluded this proffered evidence, Brown's defense was "far less persuasive than it might have been" to use the Chambers terminology.

## CONCLUSION

The Court of Appeals resolved the central issue here by simply concluding that the accused did not demonstrate any exception to the hearsay rule was applicable to these facts. Since it has been shown that much more is involved in the proffer of a third-party confession, particularly when it totally exonerates the accused, than hearsay considerations, the positions taken by the courts below, simply put, offend due process. For these reasons alone, this cause should be reviewed and reversed.

Respectfully submitted,



JAMES R. WILLIS, ESQ.
Attorney for Petitioner
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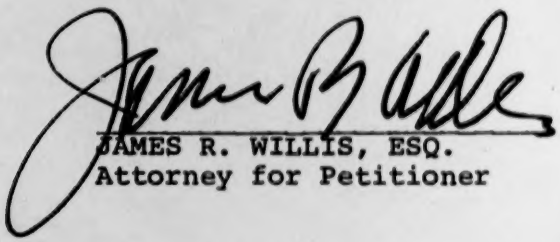
Cleveland, OH 44114
216/523-1100

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to the office of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, OH, 44113, this 29th day of May, 1981.



JAMES R. WILLIS, ESQ.
Attorney for Petitioner

# APPENDIX

THE SUPREME COURT OF THE STATE OF OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO<br>City of Columbus. | )<br>) | 1981 Term<br>To wit: March 31, 1981 |

| | |
|---|---|
| State of Ohio,<br>Appelle, | )No. 81-72<br>)MOTION FOR LEAVE TO |
| vs. | )APPEAL FROM THE COURT<br>)OF APPEALS |
| HOWARD BROWN,<br>Appellant. | )<br>)for Cuyahoga County |

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Affidavit of Poverty.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19....

.....Clerk

.....Deputy

APPENDIX "A"

THE SUPREME COURT OF THE STATE OF OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO<br>City of Columbus. | )<br>) | 1981 Term<br>To wit: March 31, 1981 |
| State of Ohio,<br>Appelle,<br><br>vs.<br><br>HOWARD BROWN,<br>Appellant. | | )No. 81-72<br>)APPEAL FROM THE COURT<br>)OF APPEALS<br>)<br>)<br>)for Cuyahoga County<br>) |

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

.....Clerk

..... .....Deputy

APPENDIX "B"

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
County of Cuyahoga

No. 42021

| | |
|---|---|
| STATE OF OHIO,<br>Appellee, | Appeal From<br>Common Pleas Court<br>No. CR 43193 |
| -vs- | |
| HOWARD BROWN,<br>Appellant. | JOURNAL ENTRY<br>AND<br>OPINION |

DATE: .....

KRENZLER, C.J.

This cause came on to be heard upon the pleadings and the.....transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following dissipation made:

Appellant Howard Brown was indicted and charged with drug trafficking, a violation of R.C. 2925.03, and permitting drug abuse in violation of R.C. 2925.13. He was tried before a jury in the Cuyahoga County Court of Common Pleas, and the jury rendered its verdict of guilty to both charges on November 29, 1979. Apellant was sentenced to one to ten years incarceration for the drug trafficking offense and six months for the second offense on February 1, 1980. Appellant

APPENDIX "C"

filed a timely Notice of Appeal of both convictions, and sets forth the following assignments of error for our consideration:

I. THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS CERTAIN EVIDENCE.

II. THE COURT ERRED IN ALLOWING THE PROSECUTION TO ELICIT TESTIMONY, OVER OBJECTIONS, CONCERNING THE PAST ACTIVITIES OF THE POLICE INFORMANT, JOHN WESLEY MARTIN: AND CONCERNING HIS "RELIABILITY": ALTERNATIVELY, THE COURT ERRED IN REFUSING DEFENSE COUNSEL THE RIGHT TO CROSS-EXAMINE THE STATE'S WITNESSES REGARDING THE PRIOR CRIMINAL RECORD OF JOHN WESLEY MARTIN. DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO HAVE BEEN CONFRONTED BY HIS ACCUSERS, WHEN THE STATE FAILED TO PRODUCE JOHN WESLEY MARTIN AT THE TRIAL OR TO MAKE HIM AVAILABLE OR PROVIDE AN ADDRESS FOR THE DEFENDANT TO HAVE SUBPOENAED HIM.

III. THE COURT ERRED IN REFUSING TO PERMIT DEFENSE WITNESS RAYMOND GRABOW FROM TESTIFYING IN REGARD TO AN AFFIDAVIT HE OBTAINED FROM ONE THOMAS BRADFORD, JR: ALTERNATIVELY, THE COURT ERRED IN NOT ADMITTING THE AFFIDAVIT IN EVIDENCE.

IV. THE COURT ERRED IN OVERRULING DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL.

V. THE VERDICT IS NOT SUSTAINED BY SUFFICIENT EVIDENCE.

VI. THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

VII. THE VERDICT IS CONTRARY TO LAW.

Briefly, the facts as testified to at trial are as follows: On July 31, 1978, John Wesley Martin, an informant often used by the East Cleveland and Cleveland police departments, offered to set up a "controlled" drug buy from appellant. East Cleveland detectives Copeland and D'Agostino agreed to supply Martin with $140.00 to purchase heroin from appellant. Thus, on that date, Martin telephoned the "Heatwave" bar, of which appellant was an owner, from a telephone in the East Cleveland police station. While both detectives listened, and the call was tape recorded, Martin spoke with a man, identified to be appellant by means of voice identification by Detective Copeland, who agreed to have two men driving a green Volkswagen meet Martin at a certain spot to consummate the sale of heroin. Subsequently, Martin met two men in a green Volkswagen at the specified location, entered the car and drove around with the men for a few minutes, and when let out of the car returned to the detectives with a quantity of brown powder identified as heroin by an Ohio Bureau of Criminal Identification and Investigation chemist. During this entire drive, the green Volkswagen and its occupants were kept under continual surveillance by Detectives Copeland and D'Agostino, as was Martin while he was picked up and dropped off by the car's occupants.

The only evidence at trial connecting appellant to the crime was the tape recording and testimony of Detectives Copeland and D'Agostino relative to the telephone conversation had by Martin, plus a transcript of that conversation.

I.

Appellant's first assignment of error asserts that the trial court erred in denying appellant's motion to suppress the tape of the telephone conversation and the transcript thereof.

No written motion to suppress appears in the record to indicate the grounds for the motion. It is clear from appellant's brief on appeal, however, that the ground asserted is a violation of appellant's Fourth Amendment right to be free from unreasonable search and seizure. In this regard, appellant draws our attention to the oft-cited case of United States v. McKeever, (S.D.N.Y. 1958), 169 F.Supp. 426, rev'd on other grounds (2d Cir. 1959), 271 F.2d 669. In McKeever, it was held that the following criteria must be met in order for a tape recording to be admitted into evidence:

> "(1) That the recording device was capable of taking the conversation now offered into evidence.
>
> "(2) That the operator of the device was competent to operate the device.
>
> "(3) That the recording is authentic and correct.

"(4) That changes, additions or deletions have not been made in the recording.

"(5) That the recording has been preserved in a manner that is shown to the court.

"(6) That the speakers are identified.

"(7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement." 169 F. Supp. at 430.

The first six criteria are evidentiary factors relative to the competency of the evidence, and appellant does not contend that the first five were not met, nor would the record indicate any lack of proper evidentiary foundation as to these factors.

Appellant does contend that the sixth criterion, identification of the speakers, was not fulfulled.[1] The applicable rule of law as to admissibility of a recording is that the speakers must be identified by a person who has heard the voice of the speaker at a prior time. United States v. McMillan, (8th Cir. 1974), 508 F.2d 101, 105, cert. denied (1975), 421 U.S. 916; see Bedford Heights v. Tallarico (1971), 25 Ohio St. 2d 211, 216-217. At the suppression

1 Appellant makes this assertion in his argument pertaining to the fourth through seventh assignments of error. It is more properly discussed as pertinent to the denial of the Motion to Suppress.

hearing and at trial, Detective Copeland testified that he watched and listened in as informant Martin placed the telephone call, so Martin's voice has been sufficiently identified. As to the voice of appellant, Detective Copeland testified that prior to the telephone conversation he had three telephone conversations with appellant, of two or three minutes duration each, in which appellant identified himself; that he had also overheard a conversation between appellant and another; and that subsequent to the telephone conversation, he had spoken with appellant, both in person and on the telephone, on at least four occasions. This testimony was clearly sufficient to establish that the sixth criterion was met for purposes of admitting the tape recording into evidence.

Appellant also draws our attention to the seventh criterion of McKeever, that the conversation was made voluntarily, and correctly suggests that this criterion has constitutional as well as evidentiary ramifications. The evidence showed that Martin phoned the Heatwave car and sought to make a heroin purchase; and the person who answered the call readily agreed; in fact, he queried of Martin whether the deal would be consummated were he to deliver the drugs. This evidence supports the trial court's implicit finding that the telephone conversation was voluntarily conducted by appellant.

Appellant further contends that the tape recording should have been suppressed because a tape recording is not constitutionally admissible unless its

recordation was consented to. The correct rule was stated in United States v. Puchi, (9th Cir. 1971), 441 F.2d 697, cert. denied (1971), 404 U.S. 853, which held that the Fourth Amendment is not violated when either of the parties to the conversation consented to its being recorded. This rule derives from the fact that a defendant's reasonable expectation of the privacy of his conversations does not mean that "the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Hoffa v. United States, (1966), 385 U.S. 293, 302. Thus, if an informant allows his conversations with the defendant to be electronically monitored, the defendant's Fourth Amendment rights have not been violated. United States v. McMillan, supra, 508 F.2d at 104; the additional fact of recording the conversations with the informant's consent does not render the procedure unconstitutional. United States v. White, (1971), 401 U.S. 745, 752 (opinion of White, Stewart, Blackmun, J.J. and Burger, C.J.).

The issue in this case is thus whether or not Martin consented to the tape recording of his telephone call to the Heatwave bar. The testimony of Detective Copeland, properly admitted over appellant's objection,[2] was that Martin had permitted the taping of the call. Thus, appellant's first assignment of error is not well-taken.

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2/ We note that a question eliciting similar information, but in hearsay form, was objected to and the objection sustained.

II

Appellant's second assignment of error raises two issues: (1) whether the court erred in allowing the East Cleveland detectives to describe their past dealings with informant Martin but disallowing cross-examination pertaining to Martin's criminal record, and (2) whether appellant's right to confront his accusers was violated due to the non-availability of Martin.[3]

The first issue is easily resolved when it is recognized that Martin merely set in motion and participated in a drug buy at the behest of the police, and that the police detectives thorougly surveilled and recorded the commission of the crimes and themselves testified to these occurrences. Any testimony elicited regarding Martin's history was completely irrelevant to the proof of the fact of the commission of the crimes. The trial court thus admitted into evidence essentially irrelevant testimony pertaining to the police officers' prior dealins with Martin; if error, this was harmless error. It was clearly then not error to refuse to allow questioning aimed at determining whether or not Martin had a prior criminal record. Martin's past criminal activities were irrelevant to proof of the prosecution's case.[4]

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3/ The record reveals that the East Cleveland Detective Bureau had never had an address for Martin. Further, Martin had not been seen in the Cleveland area for several months and could not be located.

4/ This was not a case where, for example, the reliability of an informant

An affirmative answer to the second issue would require us to hold that the prosecution must always make subject to discovery the identity of, and call at trial as a witness, every participant in a crime. This holding would be erroneous. The prosecution must, of course, prove every element of its case, but the choice of witnesses with which to do so is purely that of the prosecution. The fact that the police officers in this case were able to observe the commission of a drug sale because of the cooperation of the drug purchaser did not make the drug purchaser, Martin, an accuser of appellant in the constitutional sense.

For the foregoing reasons, appellant's second assignment of error is overruled.

III.

Appellant's third assignment of error asserts that the trial court erred in refusing to admit into evidence an affidavit executed by one Thomas Bradford, Jr., and testimony of Raymond Grabow, appellant's former attorney, as to the contents of the affidavit. We find no error on the part of the trial court.

The record reveals no attempt to introduce the affidavit itself into evidence; clearly the court therefore

(fn.4 cont'd) is crucial because the informant supplied the necessary indicia of probable cause to issue a search warrant. See, e.g., Spinelli v. United States, (1969), 394 U.S. 410.

did not err in not admitting it. As to the testimony of Grabow, the evidence proffered was clearly hearsay. Appellant was attempting to have Grabow testify as to the contents of a statement made by Bradford. Since the record does not show that any exception to the hearsay rule was applicable, which exception appellant as proponent of the evidence had the burden of demonstrating, appellant's third assignment of error is without merit.

IV.

Since appellant's fourth, fifth, sixth and seventh assignments of error all require an examination of the sufficiency of the evidence, appellant has discussed them together in his brief. We shall, therefore, also consolidate these assignments for our discussion.

Appellant does not assert that the state's burden of proof has not been met except as to the identification of the person answering the phone at the Heatwave bar as appellant. We have reviewed all the evidence and find that the verdict was amply supported by the evidence. As to the identification of appellant's voice, the testimony of Detective Copeland that he recognized appellant's voice was properly admitted,[5] and it then became the province of the jury to determine the weight and credibility of this testimony. State v. DeHass, (1967), 10 Ohio St.2d 230. Thus, appellant's four final assignments of error are without merit.

5/ See our discussion of appellant's first assignment of error, supra.

For the foregoing reasons, we affirm the judgment of the Court of Common Pleas.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PRYATEL, J. .....

PATTON, J., CONCUR...

.....

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APPEARANCES:

For plaintiff-appelle: John T. Corrigan
For defendant-appellant: Thomas L. Jacobs

N.B. This entry is made pursuant to the third sentence of Rule 22(d), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

STATE OF OHIO )
Cuyahoga County )ss

STATE OF OHIO,
Plaintiff,

vs.

HOWARD BROWN,
Defendant.

January Term, 1980
February 1, 1980

No. CR 43193 B

INDICTMENT
Rec'd for filing
Feb-7 1980
Gerald E. Fuerst, Clerk

INDICTMENT
Trafficking in Drugs,
R.C. 2925.03 w/ct Drug
Law 2925.13

JOURNAL ENTRY

The defendant herein having, on a former day of court, having been found guilty by a Jury of Trafficking in Drugs, R.C 2925.03, as charged in the first (1) count and found guilty of Drug Law, R.C. 2925.13, as charged in the second (2) count of the indictment was this day brought into court with his counsel present.

Thereupon the court inquired of the said defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced: It is therefore ordered and adjudged by the court that defendant HOWARD C. BROWN be imprisoned and confined in the Columbus Correctional Facility, Columbus, Ohio, for a term of from one (1) year to ten (10) years on the first (1) count and for six (6) months on the second (2) count, and that he pay the cost of this prosecution for which execution is awarded. Said sentences to run concurrently with each other. Appeal bond set at $25,000.00 Real Estate or Surety as to the first count and $1,500.00 Real Estate or Surety on 2nd Count. Defendant remanded./Judge Perry B.Jackson

APPENDIX "C"

## CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Constitutional Amendments:

### AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. "

### AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

### AMENDMENT XIV

"***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Rules of Evidence:

RULE 804(A)

(A) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the propronent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (B)(2), (3) or (4), his attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to

the procurement of wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

RULE 804(B)(3)

(B) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Ohio Revised Code:

§2925.03 Trafficking in drugs.
(A) No person shall knowingly do any of the following:

(1) Sell or offer to seel a controlled substance in an amount less than the minimum bulk amount as defined in section 2925.01 of the Revised Code;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution,

or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another;

(3) Cultivate, manufactur, or otherwise engage in any part of the production of a controlled substance;

(4) Possess a controlled substance in an amount equal to or exceedings the bulk amount but in an amount less than three times that amount;

(5) Sell or offer to sell a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times that amount;

* * *

(7) Sell or offer to sell a controlled substance in an amount equal to or exceeding three times the bulk amount;

(8) Provide money or other items of value to another person with the purpose that the recipient of the money or items of value would use them to obtain controlled substances for the purpose of selling or offering to sell such controlled substances in amounts exceeding a bulk amount or for the purpose of violationg division (A)(3) of this section.

* * *

(C) If the drug involved is any compound, mixture, preparation, or substance included in Schedule I with the exception of marihuana or in Schedule II, whoever

violates this section is guilty of aggravated trafficking.

* * *

(D) If the drug involved is any compound, mixture, preparation, or substance included in Schedule III, IV, or V, whoever violates this section is guilty of trafficking in drugs.

§2925.13 Permitting drug abuse.
(A) No person, being the owner, operator, or person in charge of a locomotive watercraft, aircraft, or other vehicles as defined in division (A) of section 4501.01 of the Revised Code, shall knowingly permit such vehicle to be used for commission of a felony drug abuse offense.

* * *

(C) Whoever violates this section is guilty of permitting drug abuse, a misdemeanor of the first degree, and if the offender has previously been convicted of a drug abuse offense, permitting drug abuse is a felony of the fourth degree.

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FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2026

# In the Supreme Court of the United States

**October Term, 1980**

HOWARD BROWN,
*Petitioner,*

vs.

THE STATE OF OHIO,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## COUNTER QUESTIONS OF LAW

1. Due process of law is not violated by testimony relating to an informant's past reliability. Any denial of the ability of a defendant to cross-examine police officers concerning a non-testifying informant's criminal record does not violate due process and, if error at all, was harmless. No substantial constitutional question is raised by the petitioner's question of law.

2. Neither due process nor the integrity of a criminal trial are implicated by a trial court's discretionary exclusion of evidence that was clearly hearsay, incompetent, and inadmissible. No substantial constitutional question is involved herein.

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FOR CUYAHOGA COUNTY, OHIO

---

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

## OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require the Court to review this case.

The questions herein presented were raised in the trial court, the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The jury in the trial court found the petitioner guilty of drug law violations of the Ohio Revised Code. The Court of Appeals affirmed

the judgment of conviction. The Supreme Court of Ohio dismissed the petitioner's appeal for the reason that no substantial constitutional question existed.

The Ohio courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and applicable decisions of this court. No substantial federal question is therefore presented by the petition for certiorari.

## STATEMENT OF THE CASE

Howard Brown was indicted for violations of the drug law, drug trafficking, Ohio Revised Code, Section 2925.03, and permitting drug abuse, Ohio Revised Code, Section 2925.13, on the 13th day of October, 1978, as those crimes related to an incident occurring on the 31st day of July, 1978. At the time of his arraignment on November 1, 1978, the petitioner entered pleas of not guilty to both counts. A jury trial was commenced on November 19, 1979. On November 23, 1979, the jury returned verdicts of guilty as to both counts. The petitioner was sentenced on February 1, 1980. Appellate bond was given by the trial court over the State's objection. Petitioner also entered a plea of guilty to an unrelated drug case at the time of his sentencing. Petitioner has subsequently been arrested by Cleveland Police Officers and Federal Law Enforcement Agents for separate and distinct violations of both State and Federal law.

The conviction obtained herein was subsequently appealed to the Court of Appeals of Ohio, Eighth District, County of Cuyahoga. On or about the 20th day of November, 1980, the conviction obtained was affirmed by the aforementioned Court of Appeals. On or about the 31st day of March, 1981, the Ohio Supreme Court overruled

petitioner's Motion for Leave to Appeal indicating that no substantial constitutional question existed.

The State's evidence in this case showed that on July 31, 1978, an informant for the East Cleveland Police Department set up a controlled purchase of heroin via a phone call to the petitioner. The transaction was completed by Howard Brown's accomplices, Jerome King and Thomas Bradford.

The State's first presentation of the facts was in a pretrial motion hearing, relating to the attempt to suppress the tape of the phone conversation relating to the drug transaction. Detective Copeland was the only witness presented in that motion hearing and, therefore, his testimony was not rebutted. Detective Copeland indicated that at the time of the hearing he had been employed as a police officer for the City of East Cleveland for nine and one-half years and had been working in the Narcotics Unit for seven years (R. 6). The officer indicated that he had known Howard Brown since 1972 as the result of arrests and numerous conversations with the petitioner (R. 7). Detective Copeland indicated that he had a phone conversation with Howard Brown in January of 1978 and that he had three other phone conversations with the petitioner subsequent to January of 1978 (R. 8, 9). Subsequent to the January phone conversation and as a result of the detective once again calling the Heatwave Bar, Copeland next talked to Brown in April/May, 1978 (R. 9, 10). The next two phone conversations that Copeland had with Brown occurred in July of 1978, with the second one being on the 28th day of July, 1978, a mere few days before the taped conversation in issue (R. 11,12).

Since the end of July, 1978, the detective had several more contacts with Howard Brown, to include arresting

him at the Heatwave in September of 1978; calling Brown at the Heatwave in October of 1978, and again in November of 1978; plus, an hour-long conversation with Brown at the East Cleveland Police Department during this same time frame (R. 13-15).

The taped phone conversation which led to the arrest and conviction of Howard Brown occurred on the 31st day of July, 1978 in the afternoon. Detective Copeland initially indicated the procedures he followed to ensure that the tape recorder and the tape were functioning properly (R. 18, 19). The record clearly demonstrates at page 20 of the transcript that Detective Copeland twice indicated that he had secured the informant's permission to tape the phone call prior to the placing thereof (R. 20). After calling information, the phone number of the Heatwave Bar was obtained and then dialed by the informant, John Wesley Martin, while using a phone located in the East Cleveland Police Department's Detective Bureau (R. 20, 21). Detectives Copeland and D'Agostino then monitored the entirety of the ensuing phone conversation between Martin and Brown (R. 22).

The tape itself was then played in the courtroom. Detective Copeland identified the voices on the tape as being John Wesley Martin and Howard Brown (R. 26). According to Detective Copeland, the tape fairly and accurately reflected the conversation of the two parties involved (R. 27).

Detective Copeland further indicated that the defense attorney for Howard Brown obtained a copy of the recording for the purpose of voice print identification by the defendant's independent analyst (R. 28, 29). It is to be noted that no evidence was presented either in this hearing or at trial which rebutted Detective Copeland's iden-

tification of Howard Brown's voice, even though independent analysis was made by the defendant's expert. No legitimate basis was presented by the petitioner to justify suppression. As a result of such failure on the part of the petitioner, the motion to suppress was overruled by the trial court.

Subsequent to the selection of the jury, Detective Copeland was called as the first State's witness in its case-in-chief. Once again, Detective Copeland recounted his employment and experience as a police officer (R. 75, 76). This officer first came to know the informant about one year prior to the transaction involved herein (R. 79). Martin was more closely associated with Detective D'Agostino as that detective's informant (R. 79). On the 31st day of July, 1978, John Wesley Martin arrived at the East Cleveland Police Department in the area of 4:30 p.m., where he had conversation with both Copeland and D'Agostino (R. 83). Consistently with his testimony in the motion hearing, Detective Copeland indicated the procedures he followed to ensure the proper functioning of the tape recorder and tape to be used for purposes of recording the conversation that ensued, wherein Martin arranged to buy drugs from Howard Brown (R. 83). After observing Martin dial the number for the Heatwave Bar, Detective Copeland monitored the phone conversation (R. 85). Once again, Detective Copeland identified the tape used, the voices thereon, and a typed transcript (State's Exhibit #2) of that recorded phone conversation (R. 88, 90, 94). Detective Copeland, for the jury's benefit, recounted the numerous times since 1972 that he had talked to Howard Brown, either in person or over the phone (R. 91, 92). As of the time that trial commenced in this case, Detective Copeland indicated that he had heard Brown's voice between fifteen and twenty times (R. 93).

The gist of the phone conversation in which the person called announced himself to be "Howard", was that Martin would buy drugs for $140 and that the seller (Howard Brown) would be sending his accomplices in a green Volkswagen in order to complete the transaction (See State's Exhibit #2).

After the phone call, which was monitored by Copeland and D'Agostino, Martin was strip searched and given the appropriate funds in order to complete the transaction (R. 95, 97). The informant was then transported in an unmarked police car to the area of Hatton's Bar in East Cleveland (R. 101). Shortly after Martin exited the police car, he was picked up by two males, subsequently identified as King and Bradford, who were in the green Volkswagen that had been mentioned in the phone conversation (R. 101). Detective D'Agostino, who was the passenger in the police car, began to take photographs of the transaction and of the parties involved (R. 103, 201).

With Martin now in the green car, that car left the Windemere Rapid parking lot and was followed by the police as the VW proceeded in an easterly direction on Euclid Avenue in the City of East Cleveland, County of Cuyahoga, and State of Ohio (R. 107, 108). After traveling about four blocks, Martin exited the green car and returned to the police car (R. 109). King parked his car in front of Two-Jack's Bar. King and Bradford exited the vehicle and were photographed by D'Agostino (R. 111, 201). From the time that Martin left the police car to the time that he returned, he was never out of sight of the two detectives (R. 111).

When Martin returned to the police car, he handed Copeland a clear plastic bag containing a brown powdery substance which he could only have obtained while in the green Volkswagen (R. 118). Thus, the transaction initiated

via the phone conversation with Howard Brown, whom Detective Copeland knew as an owner of the Heatwave Bar (R. 116), was completed in accordance with the instructions given to Martin by Brown over the phone.

Martin, Copeland and D'Agostino, returned to the East Cleveland Police Department. Once again a strip search of Martin was conducted by Copeland and D'Agostino (R. 120, 204). As with the strip search conducted prior to their leaving the East Cleveland Police Department, no drugs or money were found on John Martin (R. 95, 120, 204).

During the course of Detective Copeland's testimony, in an improper fashion, and without ever establishing the veracity thereof, the defense attorney recounted that which he purported to be the informant's prior record in the presence of the jury.

The packet that Martin turned over to Copeland was subsequently transported to the Ohio Bureau of Criminal Identification and Investigation at Richfield, Ohio, where the substance was tested by Michael Gingo of that State agency (R. 169, 171). By way of the chemical analysis conducted, Mr. Gingo determined that the substance obtained by Martin weighed 2.4 grams and contained the presence of heroin, a Schedule I drug (R. 171, 175, 177).

The petitioner presented several witnesses in his own behalf to include attorney, Raymond J. Grabow. Apparently, and prior to the testimony of any other witness, the petitioner sought to introduce a hearsay statement which was never properly qualified through Grabow. That statement was never introduced into evidence nor does the record reveal that it was ever proffered for purposes of the record. The petitioner, through his attorney, Thomas Jacobs, called both co-defendants to the witness stand. In

an unseemly display, Mr. Jacobs called Bradford and King knowing full well that they would assert their rights under the Fifth Amendment. Mr. Jacobs went so far as to indicate with respect to King that "I'll let him take the Fifth Amendment" (R. 264), and still proceeded to call King and Bradford as witnesses.

None of the witnesses presented on behalf of the petitioner rebutted any of the State's evidence.

## REASONS FOR DENYING THE WRIT

**1. Due process of law is not violated by testimony relating to an informant's past reliability. Any denial of the ability of a defendant to cross-examine police officers concerning a non-testifying informant's criminal record does not violate due process and, if error at all, was harmless. No substantial constitutional question is raised by the petitioner's question of law.**

The police officers obviously testified that Martin was an informant, reliable to them. The jury had the right to believe or disbelieve that, assuming its relevancy. Clearly, through a series of wholly improper questions, defense counsel divulged what he purported to be the prior record of the informant. However, the petitioner failed to offer or proffer any evidence tending to establish whether or not the informant did have a prior record. The police officers did not render any expert opinions as to the informant's good citizenship.

The complained of testimony herein was irrelevant to the proof of the fact of the commission of the crimes involved. The police thoroughly monitored and surveilled the entire transaction set in motion by the informant and the petitioner. The informant's past activities were irrele-

vant to the proof of the State's case. If there was any error at all, such error was harmless. *Harrington v. California* (1969), 395 U.S. 250; *Chapman v. California* (1967), 386 U.S. 18.

The petitioner raised no substantial constitutional question herein and offers no law in support of the proposition.

**2. Neither due process nor the integrity of a criminal trial are implicated by a trial court's discretionary exclusion of evidence that was clearly hearsay, incompetent, and inadmissible. No substantial constitutional question is involved herein.**

Petitioner in his brief indicates that the petitioner interposed some defense at trial. The record does not support such an assertion. No defense was ever presented by way of competent evidence in this matter. The Bradford affidavit was never properly qualified, was not introduced into the evidence, and was not proffered for the record. One can only assume that the sham defense cannot be considered by this Honorable Supreme Court, since the hearsay statements were incompetent evidence and not part of the record of this matter.

Clearly, the petitioner was trying, through Attorney Grabow, to do indirectly that which he could not do directly. The failure to even proffer the affidavit gives rise to the inference of its concocted nature and gross incompetence as evidence.

Petitioner in this brief cites with relish the new Rules of Evidence, but failed to turn the Appellate Court's attention to the provisions of Ohio Evidence Rule 804(B)(3), even though he now turns this Court's attention to the rule which states:

"Statement against interest.

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, *is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.*" (Emphasis added.)

Clearly, and even though this case was tried long before the new Ohio Rules of Evidence came into effect, even if the Rules had been in effect, no evidence was offered or proffered to show any corroborating circumstances indicating the trustworthiness of the Bradford affidavit.

The trial court, in the sound exercise of its discretion, properly found the evidence to be incompetent, and, therefore, of no value to the jury in its search for the truth.

The record does not show the applicability of any exception to the hearsay rule. At trial, it was incumbent upon the petitioner, as the proponent of such hearsay, to demonstrate some exception in order to gain admission of the declaration. The petitioner failed to so demonstrate any grounds for admission.

A case interpreting the equivalent Federal Rule, 804 (b) (3) is *Lowery v. State of Maryland* (1975), 401 F. Supp. 604. In *Lowery,* an affidavit of a co-defendant who had testified for the prosecution, and thereby aided in the conviction of David Lowery, subsequently—three years after the trial—came into the possession of the defendant—

Lowery. The affidavit was declared to be inadmissible since it lacked sufficiently reliable corroborating circumstances. *Lowery* is analogous to this matter since the affidavit was not spontaneous in that it was manufactured on or about the 25th day of April, 1979, nearly a year after the time of the crime, i.e., the 31st day of July, 1978.

The sham nature of the affidavit was clearly apparent to the court upon its reading thereof. The "Bradford affidavit" falls by its own terms since it speaks of some alleged scam worked out by Martin and Bradford occurring as the affiant states "sometime in August of 1978". Clearly, the alleged scam occurred after the date of the crime herein, assuming arguendo any scam at all.

Further, it is not necessarily true that Bradford was unavailable as a witness. Clearly, Bradford had waived whatever Fifth Amendment rights he may have had by the admission to a third party, not his attorney of record, of the alleged commission of some other crime involving a scam of the East Cleveland Police Department. As such, it may be argued that such alleged admission conceivably precluded him from asserting any Fifth Amendment rights. See *Couch v. United States* (1973), 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548.

Regardless of the status of Bradford's Fifth Amendment privilege, it is clear that the "corroboration requirement" is to "be construed in such a manner as to effectuate its purpose of circumventing fabrication." Advisory committee notes printed in 28 U.S.C.S. App. 547. The delay in obtaining the affidavit and the fact that the affidavit refers to a time period subsequent to the commission of the crime herein demonstrates the fictional nature thereof and its basic incompetence as evidence to aid a jury in the search for the truth. The spontaneity requirement was

alluded to in *Chambers v. Mississippi* (1973), 410 U.S. 284, 300, 93 S. Ct. 1038, 35 L. Ed. 2d 297, a case which the petitioner cites in support of his position.

This question of law is without merit since no substantial constitutional question is raised hereby.

## CONCLUSION

We respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 80-2026

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, TERM, 1980

HOWARD BROWN,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

# PETITIONER'S REPLY

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PETITIONER'S REPLY

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One reading the State's Brief in Opposition simply cannot avoid, or otherwise escape, being made aware of its lack of substance. Also, the fact that it would take this Court outside the Record in this case for what it views as facts relevant to this cause, shows a type of desperation that should be credited. For if the conviction in this case conformed with the requirements of due process, it would be unnecessary for the prosecutor to inform the Court that "petitioner also entered a plea of guilty to an unrelated drug case at the time of sentencing." And, that "petitioner has subsequently been arrested by Cleveland Police Officers and Federal Law Enforcement Agents for separate and distinct violations of both State and Federal Law" (Brief in Opposition, p. 2).

Stated another way, the artificial inclusion of the above-referred to facts in the State's response really borders on being insulting. There is simply no chance this Court would ever resolve a question as to whether an accused had a fair trial on the basis of his conduct after the trial under review.

I

What has been said above actually puts in focus the State's argument that the error involved in allowing the officers to testify as to the reliability of an unavailable informant whose actions were orchestrated by the officers involved.

Simply put, for the State to now say the evidence tending to show this person's lack of reliability was irrelevant to the issues at this trial or that, at best, its improper exclusion was harmless beyond a reasonable doubt, shows a surprising lack of depth. This is so because if the informant's reliability was totally irrelevant to the issues in the case, why then was it necessary for the State to prove through the officers the man was, if the officers' testimony was believed, reliable and fully creditable. Indeed, the fact that the State would argue to the Court that "the jury had the right to believe or disbelieve" (id., at 8) a nontestifying informant was reliable magnifies the critical point here.

This being so, to argue as the State does that the officers' testimony

showing the informant was reliable is conclusive proof such was the case makes sense only to this prosecutor. For only this prosecutor could argue an "informant's past activities were irrelevant to the proof of the State's case" (id., at 8-9), then willfully bombard the jury with evidence that the man was reliable.

II

The State's argument that the issues raised under this segment of the petition do not involve a "subsequent constitutional question" is a real cop out. The same is true of the absolutely ridiculous assessment of the evidence bearing on this point.

As to the State's argument that "it is not necessarily true that Bradford (the declarant) was unavailable as a witness" (id., at 11), the Record shows the trial court fully credited Bradford's assertion of the amendment. This fact then conclusively resolves any question as to availability.

Then we have the rather sophomoric argument that "no evidence was offered or proffered to show any corroborating circumstances indicating trustworthiness" (id., at 10). Here, of course, it cannot be that the credibility of the witness to the declarant's statements against penal interests that were offered to exculpate this petitioner did not weigh heavily in favor of probativeness and trustworthiness. The witness was an attorney, the mayor of a large suburban

community in the County, which is a relevant consideration bearing on his veracity. The fact that the declarant furnished a sworn affidavit to the same effect can hardly be overlooked. Also to be factored is the undeniable fact of the declarant's involvement in the offense then being tried. See United States v. Thomas, 571 F.2d 285, 290 (5th Cir. 1978).

At least this much seems certain -- the courts have yet to make the burden of corroboration on the defendant very high. See United States v. Benveniste, 564 F.2d 335, at 341-342 (9th Cir. 1977). Indeed, the fact that the court in Benveniste relied as heavily as it did on Chambers v. Mississippi, 410 U.S. 284, 302 (1973), emphasizes the shallowness of the State's argument.

## CONCLUSION

In the Chambers case, this Court characterized the corroborating evidence "as well within the basic rationale of the exception for declarations against interest" (410 U.S., at 587). By comparison, the corroboration in this case provided by the integrity of the witness and the fact that the decedent had sworn to his evidence makes our case even stronger than Chambers. When this circumstance, in addition to the right of an accused to present evidence, is considered; the exclusion of evidence sought to be admitted here simply cannot be defended in law, logic or common sense.

Respectfully submitted,

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## CONCLUSION

It is hereby certified that a copy of the foregoing Reply was mailed to John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, OH, 44113, this 9th day of July, 1981.

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